

**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF ALABAMA, EASTERN DIVISION**

VFS LEASING CO.

Plaintiff,

vs.

G.F. KELLY, INC. d/b/a KELLY
TRUCKING; and GUY KELLY,

Defendants

CIVIL ACTION NO.
3:06cv638-SRW

MOTION TO CONTINUE SUMMARY JUDGMENT PROCEEDINGS

COMES NOW the Plaintiff, VFS Leasing Co., and moves the Court to continue the summary judgment proceedings and extend the briefing schedule for its summary judgment motion. In support of this motion to continue, Plaintiff states as follows:

1. Plaintiff moved for summary judgment on November 28, 2006. After receiving extensions to conduct discovery and submit a response in opposition, Defendants submitted their opposition to summary judgment on February 13, 2006. Under this Court's Scheduling Order, Plaintiff may file its reply brief in support of summary judgment on or before February 26, 2007.

2. Defendants' opposition to summary judgment raises the affirmative defense of mitigation of damages. Defendants bear the burden of proof on this defense. *Prudential Ballard Realty Co. v. Weatherly*, 792

So. 2d 1045, 1048 (Ala. 2000); *Pinckney v. Baker*, 504 S.E.2d 99, 101 (N.C. App. 1998).

3. Plaintiff propounded discovery requests on December 19, 2006 seeking the identity of Defendants' experts, but has not received responses.

4. Defendants' opposition brief included the affidavits of two previously undisclosed experts. Further, Defendants state in their opposition brief that they will name a third expert on or before February 28, 2007. Because these experts have only just been named (and one is yet to be named) Plaintiff has not had the opportunity to depose any of Defendants' experts. Plaintiff requests that this Court extend the summary judgment proceedings until after the April 1, 2007 discovery cut-off so that Plaintiff may depose Defendants' experts and select and call any experts of its own to rebut the defenses raised by Defendants in their opposition.

5. Concluding the summary judgment proceedings before Plaintiff has the opportunity to depose Defendants' experts may result in unnecessarily duplicative proceedings. Proceeding with summary judgment now may simply require the parties to re-file and re-brief the summary judgment issues at the close of discovery, once Defendants' experts are deposed.

6. Such duplicative proceedings can be avoided, however, if the Court will continue the summary judgment proceedings until the close of discovery. This will provide Plaintiff with the opportunity to depose Defendants' experts on Defendants' affirmative defense, and will ultimately streamline the summary judgment process.

7. Moreover, continuing the summary judgment proceedings will permit this Court to fully consider the opinions of the parties' experts, and the bases for those opinions, in rendering its opinion on summary judgment.

8. Therefore, Plaintiff requests that this Court continue the summary judgment proceedings until after the close of discovery on April 1, 2007.

9. Plaintiff's counsel has tried repeatedly to contact Defendants' counsel about the proposed continuance but has not heard back from him.

WHEREFORE, Plaintiff requests that this Court continue the summary judgment proceedings through the discovery period and require that Plaintiff's reply brief be due on or before April 12, 2007.

Respectfully submitted this 21st day of February, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of February, 2007, the foregoing has been electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing, to the following counsel of record:

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